

In the Matter of Merchant Mariner's Document No. Z-169842
Issued to: WILLIAM SAMUEL WRIGHT

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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WILLIAM SAMUEL WRIGHT

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

On 15 June, 1951, an Examiner of the United States Coast Guard at Norfolk, Virginia, revoked Merchant Mariner's Document No. Z-169842 issued to William Samuel Wright upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as ordinary seaman on board the American SS HAMILTON VICTORY under authority of the document above described, on or about 1 April, 1951, while said vessel was in the port of Hampton Roads, Virginia, he wrongfully had a quantity of marijuana in his possession. On his own motion, the Examiner had amended the specification to read "wrongfully" rather than "unlawfully."

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Although advised of his right to be represented by an attorney of his own selection, Appellant voluntarily elected to waive that right and act as his own counsel. He entered a plea of "not guilty" to the charge and specification proffered against him.

Thereupon, the Investigating Officer made his opening statement and introduced in evidence the testimony of U. S. Customs Agent Osmer who had apprehended the person charged. The U. S. Customs Laboratory Report of the analysis of the substance found to be marijuana was read into the record before the Investigating Officer rested his case.

In defense, Appellant offered in evidence the testimony of Vernon L. Giddings, the deck maintenance man with whom Appellant was working at the time he claims to have found the marijuana. Appellant also testified under oath in his own behalf.

At the conclusion of the hearing, having given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his findings and concluded that the charge had been proved by proof of the specification and entered the order revoking Appellant's Merchant Mariner's Document No. Z-169842 and all other licenses, certificates of service and documents issued to this Appellant by the United States Coast Guard or its predecessor authority.

From that order, this appeal has been taken, and it is contended that Appellant is not guilty since he was tried and acquitted on identical charges on 24 May, 1951, before Judge Bryan in the Federal Court for the Eastern District of Virginia.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 1 April, 1951, Appellant was serving as ordinary seaman on board the American SS HAMILTON VICTORY and acting under authority of his Merchant Mariner's Document No. Z-169842 while said vessel was at Hampton Roads, Virginia, after completion of a foreign voyage.

On this date, Customs Agent Osmer boarded the HAMILTON VICTORY and apprehended Appellant with five cellophane wrapped packages of marijuana about the size of match boxes in his possession. These packages were found in the right hand pocket of a jacket worn by Appellant. On each of four unopened packages, there was a white sticker with a number on it. The fifth package, which had been opened, did not have a sticker attached. After making a thorough search of Appellant's person and quarters, Agent Osmer took Appellant before the United States Commissioner and he was released under \$10,000 bond.

At the time of the arrest, there were two other Customs Officers with Mr. Osmer. They were told by Appellant that he had found the five cellophane wrapped packages on the deck in the number five hold of the ship that morning and intended to give them to the Master. Appellant also stated, at this time, that he did not use marijuana.

There is no record of any prior disciplinary action having been taken against Appellant. He is 30 years of age and has been going to sea for approximately nine years.

OPINION

The Examiner's order was based upon his conclusion that the charge and specification were proved since he failed to believe Appellant's testimony explaining how the marijuana came into his possession. On the other hand, this appeal is based on the contention that Appellant is innocent because he was acquitted on identical charges in the Federal Court for the Eastern District of Virginia.

Appellant testified that he and Giddings had been cleaning the rubbish out of the number five hold and that they were leaving the hold when Giddings told Appellant to pick up a piece of a broken shovel and a brown paper bag which was under it. Appellant stated that Giddings was nearby when Appellant picked up the paper, felt something in it, opened it and found the five cellophane wrapped packages; that Appellant opened one of the packages when told to do so by Giddings; that Giddings said "it might be dope" and told Appellant to "take it to the Captain"; and that Appellant put the five packages in his jacket before going topside to look for the Master. Appellant further testified that the Master had gone ashore but he did not turn the packages over to

the Chief Mate because there had been recent confusion and friction aboard the ship between the crew and officers and that the Master and Chief Mate were not on friendly terms. For this reason, Appellant stated that he did not trust the Chief Mate. Shortly thereafter, the Customs officials came aboard and apprehended Appellant with the marijuana still in his jacket pocket. Appellant stated that he had not voluntarily turned it over to the Customs men because he did not know what it was.

The testimony of Giddings was substantially the same as that of Appellant. Giddings stated that after he told Appellant to pick up the part of the broken shovel and paper bag, he started up the ladder and did not see Appellant pick up the bag; that when Appellant called, Giddings turned around and saw the cellophane packages in Appellant's hand; and that one package was "open" or "opened" but his testimony is not clear as to whether it was opened before or after he first saw Appellant holding the five packages.

The disbelief of Appellant's testimony by the Examiner is predicated almost entirely upon his impression that the testimony of Appellant and Giddings conflicted in two respects: whether Giddings saw Appellant pick up the marijuana packages from the deck; and whether one of the packages was opened before or after Giddings first saw them in Appellant's possession. The testimony discloses that Giddings replied in the negative on the first point and Appellant refused to answer two leading questions by the Examiner as to whether Giddings actually saw Appellant pick up the brown bag and find the five packages. In answer to a third similar question, Appellant's answer was ambiguous (due largely to the vagueness of the question) as to whether he meant that he knew Giddings had seen the brown package or knew he had seen Appellant pick it up. The former interpretation completely agrees with Giddings testimony that he told Appellant to pick up the brown bag and shovel. If the latter meaning was intended by Appellant, it is perfectly plausible that he might well have thought Giddings was watching as Appellant bent over to pick up the shovel and bag when, in fact, Giddings had turned his back and started to climb the ladder to the main deck. Concerning the point as to when the one package of marijuana was opened, Appellant stated that it was after Giddings had been shown the five packages and Giddings answers were indeterminate. Giddings did not affirm or deny Appellant's testimony that he opened one of the marijuana packages when told to do so by Giddings. The Examiner questioned Giddings on behalf of Appellant but this specific question was not asked. Hence, there does not appear to have been any definite conflict between the testimony of Appellant and Giddings on these two points. Consequently, they afforded no basis upon which to reject Appellant's testimony as being incredible.

There is also considerable reference to and questioning by the Examiner concerning another narcotics offense of which Appellant was suspected at the time of his apprehension with the marijuana upon which this charge and specification are based. Evidence of this alleged prior offense is completely irrelevant to the merits of the case which was before the Examiner. Because of its tendency to destroy the presumption of innocence in favor of Appellant, the only possible basis for admissibility, before the Examiner made his findings, would have been the introduction of a record of conviction for the former incident to show a common plan or design; or for the purpose of impeaching Appellant's testimony - or his character if the latter had been put in issue. As there was no evidence of a conviction, the questioning of Customs Agent Osmer and Appellant about the other narcotics charge was improper since, presumably, the accusation had been successfully met. The

fact that the questions on this subject were propounded by the Examiner indicates that he was impressed to the extent of being influenced by this other charge against Appellant. And it is evident from the Examiner's decision that this was an additional factor which led him to doubt Appellant's credibility. The criterion in such cases is not the effect which this prejudicial error has upon the appellate authority but the extent to which the Examiner as the trier of the facts was apparently swayed by it. The issue is particularly important in a case of this nature where the result depends almost entirely upon the evaluation by the Examiner of the Appellant's testimony. Consequently, consideration of this prior incident was prejudicial and affected the substantial rights of Appellant who was entitled to be tried upon evidence which was competent for the offense charged.

Although an acquittal in Federal court on identical charges is not conclusive evidence of innocence in this administrative proceeding, the reasons for such an acquittal are very likely to be relevant to the issues in this case and merit some consideration in arriving at a fair and just decision. Assuming the accuracy of Appellant's contention that he was acquitted in the Federal Court for the Eastern District of Virginia when tried on charges based on the same acts herein under consideration, evidence of a more reliable character than is contained in this record is required to support the findings and conclusions of the Examiner unless Appellant was acquitted for some reason which does not necessarily make the decision of the Examiner inconsistent with the acquittal in the Federal Court.

The testimony of the Appellant that the Shipping Commissioner told Appellant, on 7 April, that \$106.12 would be deducted from his wages to pay a fine in connection with his possession of the marijuana in question and that he was finally paid his wages on 7 May without any such deduction having been made, indicates the possibility of the presence of additional evidence upon which the acquittal in the Federal Court was based. On the other hand, the fine might have been paid by Appellant subsequent to receiving his wages.

Proof that a white sticker, similar to those which were on the four unopened packages of marijuana, was found on Appellant's person or in his quarters would be substantial evidence upon which to reject the testimony of the Appellant and to find the charge and specification proved on the theory that Appellant had the marijuana in his possession prior to the time he picked up the shovel and bag in the hold of the ship. There is testimony by Osmer to the effect that such a sticker was found in a match box either in Appellant's belongings or in his immediate possession; but the testimony is not clear as to which of these two places the sticker was found and who found it. Osmer at first answered in the affirmative when asked if he had found the match box in Appellant's pocket and then stated in answer to the next question by Appellant that Port Patrol Officer Thomason had found it. Appellant testified that no match box had been found in his pocket and that he had been searched only by Osmer. Appellant repeatedly stated that Osmer admitted in court that he was the only one who searched Appellant; and that this issue was explored by Appellant's lawyer at the trial in the Federal Court when "the other gentleman" (presumably Port Patrol Officer Thomason) testified that a match box was found on Appellant. If Osmer was the only one who searched Appellant's person, then a fifth sticker could not have been discovered on him by Thomason. Thus, the testimony of the only witness to appear against the person charged was self-contradictory on the point as to who found the sticker; and, if Appellant's testimony is correct

as to what occurred in Federal Court, Osmer's testimony was not in accord with what he testified to in the Federal Court. Therefore, the finding that a sticker similar to the other four was found in a match box on the person charged is not based on substantial evidence.

The only evidence in addition to Osmer's testimony, which was produced by the Investigating Officer was the U. S. Customs Laboratory Report which states that the sample "received" was 14.7 grains of marijuana. Although identified by Osmer as the report on a composite sample of the five packages found on Appellant, further identification and clarification of this report is deemed advisable since Osmer testified that the substance was analyzed and amounted to four ounces and 110 grains but the source of the latter figure is not specific. Without proper explanation of these contrasting figures or other identification, the report is not considered to be adequate corroborating evidence.

CONCLUSION AND ORDER

For these reasons, I do not feel that the findings and order appealed from are supported by substantial, reliable and probative evidence. Therefore, the order of the Examiner dated 15 June, 1951, is reversed and the case remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Merlin O'Neill
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 8th day of November, 1951.